

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF  
WATER TO VARIOUS WATER RIGHTS HELD  
BY OR FOR THE BENEFIT OF A&B  
IRRIGATION DISTRICT, AMERICAN FALLS  
RESERVOIR DISTRICT #2, BURLEY  
IRRIGATION DISTRICT, MILNER IRRIGATION  
DISTRICT, MINIDOKA IRRIGATION  
DISTRICT, NORTH SIDE CANAL COMPANY,  
AND TWIN FALLS CANAL COMPANY

Docket No. CM-DC-2010-001

**ORDER DENYING MOTION FOR  
DIRECTOR TO ISSUE  
SUBPOENAS**

**BACKGROUND**

On June 1, 2023, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Idaho Falls, Jerome, Paul, Pocatello, Richfield, Rupert, Shoshone, and Wendell (collectively the “Cities”), the Idaho Ground Water Appropriators, Inc. (“IGWA”), Bonneville-Jefferson Groundwater District (“BJGWD”), and Bingham Groundwater District (“BGWD”) (collectively “Groundwater Users”), filed a *Motion for Director to Issue Subpoenas* (“Motion for Subpoenas”).

The Groundwater Users’ motion requests that the Director issue subpoenas for Mathew Weaver, Deputy Director of the Idaho Department of Water Resources, and Tony Olenichak, Water District 01 Watermaster. *Motion for Subpoenas* at 2. The Groundwater Users further request that the witnesses be put on notice that they may be called at any time between June 6–10. *Motion for Subpoenas* at 3.

**ANALYSIS**

Rule 523 of the Department’s Rules of Procedure grants the presiding officer the discretion to issue subpoenas. IDAPA 37.01.01.523 (“The presiding officer may issue subpoenas upon a party’s motion or upon its own initiative.”). Idaho Rule of Civil Procedure (“I.R.C.P.”) 45(d)(1) advises that the court may quash or modify a subpoena if among things the subpoena is “unreasonable, oppressive, fails to allow time for compliance, requires disclosure of privileged or other protected matter and no exception or waiver applies, or subjects a person to undue burden ....”

It does not appear Idaho Appellate Courts have answered what constitutes an unreasonable time for compliance with a subpoena to attend a hearing as contemplated under I.R.C.P. 45(d)(1). “In cases where no Idaho case law is directly on point, federal case law interpreting a similar federal rule can be persuasive.” *State v. Fox*, 170 Idaho 846, 859, 517 P.3d 107, 120 (2022) (quoting *State v. Loera*, 167 Idaho 533, 538, 473 P.3d 802, 807 (2020)). Federal Rule of Civil Procedure (“F.R.C.P.”) 45(3)(A)(i) advises that the court must quash a subpoena that “fails to allow a reasonable time to comply[.]” F.R.C.P. 45(3)(A)(i) is substantially similar

to I.R.C.P. 45(d)(1). Federal Courts appear to conclude that 14 days is presumptively reasonable, but notice of a week or less has generally been considered unreasonable. *See Angelo, Gordon & Co., L.P. v. MTE Holdings, LLC*, No. 20 MISC. 23, 2020 WL 4700910, at \*2 (S.D.N.Y. Aug. 13, 2020) (citations omitted); *see also Jordan v. Comcast Cable Commc'ns Mgmt., LLC*, No. 1:14-CV-3622-WSD, 2016 WL 5899314, at \*1 (N.D. Ga. Oct. 11, 2016) (“The Court finds Plaintiff’s Counsel’s subpoena, served a week before the hearing and before a three-day holiday weekend, fails to allow a reasonable time to comply and would subject Defendants to undue burden[.]”); *Brown v. Hendler*, No. 09 CIV. 4486 RLE, 2011 WL 321139, at \*2 (S.D.N.Y. Jan. 31, 2011) (“[T]he Court finds that nine days was not a reasonable time to comply with the subpoena.”).

As it pertains to Mr. Olenichak, he is not a party to this action. He lives in Idaho Falls, approximately 280 miles from Boise where the hearing will be held. The Groundwater Users have requested he be available to testify from June 6–10. *Motion for Subpoenas* at 3. It is unreasonable and overly burdensome to request a subpoena requiring Mr. Olenichak to travel—and stay overnight for 5 days—on less than a week’s notice. This is especially true given that the hearing was set on April 21, 2023, or approximately 6 weeks ago. The Groundwater Users may request that Mr. Olenichak appear to testify of his own accord, whether remotely or in-person. But the Director will not subpoena Mr. Olenichak under these circumstances.

As it pertains to Mr. Weaver, he is likewise not a party to this action. Moreover, as the Groundwater Users advise, he is currently on a family vacation out of the country and will remain out of the country throughout the duration of the hearing. The Groundwater Users suggest Mr. Weaver could appear remotely as other individuals intend to. This is true, but Mr. Weaver was provided no advanced notice to prepare prior to leaving the country.

The Director has already identified two Department staff to testify at the hearing, Matthew Anders and Jennifer Sukow. During the prehearing conference the Director advised the parties he was limiting staff witnesses to Matthew Anders and Jennifer Sukow, but advised that he would consider enlarging the list if the parties could identify issues “outside of those that Matt Anders or Jennifer Sukow could discuss ....” Prehr’g 41:25–41:41. The Groundwater Users request a subpoena so they can question Mr. Weaver concerning “the Department’s preparation and issuance of the Fifth Methodology Order and the As-Applied Order ....” *Motion for Subpoenas* at 2. The Ground Water Users have failed to identify issues outside of those that Matthew Anders and Jennifer Sukow could discuss and which are appropriate for Mr. Weaver to testify to. Mr. Weaver cannot speak to what information the Director considered, the *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* speaks for itself in that regard.

**ORDER**

Based on the forgoing discussion, IT IS HEREBY ORDERED that the Groundwater Users' *Motion for Director to Issue Subpoenas* is DENIED.

DATED this 7<sup>th</sup> day of June 2023.



Gary Spackman  
Director

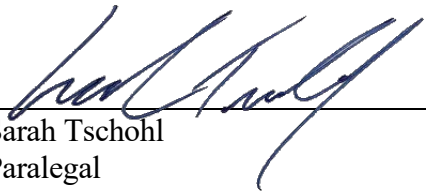
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of June 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

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